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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-885

RICHARD LEON SHERMAN,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY COMMENTS

This response to the Petition for Writ of Certiorari is filed pursuant to the request of this Court dated 12 February, 1980.

JURISDICTION

Petitioner has invoked 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. Whether the issues in this case establish jurisdiction in this Court.

2. Whether the State properly disclosed the name of the woman involved in the incident.

3. Whether the State properly did not produce a witness whose location it did not know.

4. Whether Petition can now complain about the alleged failure of the State to produce the witness when Petitioner chose to take the case to verdict rather than to ask for a continuance.

STATEMENT OF FACTS

On 20 January, 1977, Petitioner sold a pound of marijuana to TFC Mickey Norman of the Maryland State Police for $400.00. TFC Norman was working undercover on narcotics and purchased the marijuana from Petitioner at Petitioner's apartment in Randallstown, Baltimore County (T. 10-12). Petitioner was tried and convicted of distributing marijuana (T. 183). He was sentenced to five (5) years in the Department of Correctional Services with two and a half years suspended (T. 15), the sentence to be concurrent with a sentence imposed by a federal court (T. 16). Petitioner appealed and his conviction was affirmed by the Court of Special Appeals in an unreported decision filed 4 June, 1979. The Court of Appeals of Maryland denied Petitioner's petition for a Writ of Certiorari on 10 September, 1979.

At trial Petitioner raised the defense of entrapment. Petitioner sought as a witness a woman who had accompanied TFC Norman to Petitioner's apartment. Petitioner claimed the woman was a police agent and had entrapped him.

Petitioner filed a motion to produce the woman, believed to be Janice Carr. A hearing on the motion was held on 16 November, 1979. At that time, the trial judge did not grant the motion as the prosecutor agreed to try to locate the woman (T. 3).

Trial commenced on 28 November, 1977. TFC Norman stated that the woman was not Janice Carr but was named Darlene Jaworski (T. 14-15). TFC Norman stated that he had information that perhaps Carr and Jaworski, who were apparently sisters, were either in Hawaii or Colorado (T. 21-22). The defense produced Edward Jaworski, the ex-husband of Darlene Jaworski and current client of the defense attorney's law firm. Mr. Jaworski testified that both Janice and Darlene were in Hawaii (T. 107-116). Defense counsel then requested a week continuance to locate Darlene and the court granted a two week continuance (T. 118). On 2 December, 1977, a motion to compel the State to produce Darlene Jaworski was filed. It appears from the record that no action was taken on this motion.

Trial resumed on 13 December, 1977 and neither Carr nor Jaworski were present. Defense testimony was heard from Bernadette Carr (T. 129-143) and Stephen Johnson (T. 143-151). Bernadette Carr, Janice's sister-in-law, testified that she received mail from Janice mailed from Hawaii (T. 137-139). Johnson, Bernadette's fiance, testified that he once answered the telephone, receiving a call for Bernadette from Janice in Hawaii (T. 148-149). There was no further testimony.

Both sides rested and Petitioner made a motion for judgment of acquittal (T. 153). Petitioner argued his motion at length (T. 154-167), specifically urging the court to accept the defense of entrapment. The trial judge found the Petitioner guilty (T. 183).

ARGUMENT

I.

THE ISSUES IN THIS CASE DO NOT ESTABLISH JURISDICTION OF THIS COURT.

Petitioner bases the jurisdiction on 28 U.S.C., § 1257(3) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

However, the issues in this case are such that Petitioner cannot claim any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States.

The basis of Petitioner's defense at trial and the basis of his appeal is the entrapment defense. However, there is no constitutional basis for the entrapment defense and hence jurisdiction under 28 U.S.C., § 1257(3) is not appropriate in this case.

In *Sorrells v. United States*, 287 U.S. 435 (1932), this Court first recognized the entrapment defense but held that it was based on a matter of statutory construction, not a Constitutional right. 287 U.S. at 448. The issue arose again in *United States v. Russell*, 411 U.S. 423 (1973) wherein respondent's "principal contention [was] that the defense should rest on constitutional grounds," 411 U.S. at

430. This Court specifically rejected that contention, 411 U.S. at 432-433. This holding was not disturbed in *Hampton v. United States*, 425 U.S. 484, 489-490 (1976).

Thus, because entrapment does not give rise to a due process claim and is not of a constitutional dimension, any petition based on it does not fall within the jurisdiction of 28 U.S.C., § 1257(3) and should therefore be denied.

Furthermore, *Roviaro v. United States*, 353 U.S. 53 (1957), cited at length by Petitioner, likewise does not provide a federal question on which Petitioner may base his case. Nowhere in *Roviaro* does this Court hold or suggest that Roviaro had a constitutional right to force the Government to disclose the name of its informant. Rather, the *Roviaro* holding is based on federal court procedure and law and hence does not create a constitutional right upon which Petitioner can base his claim.

II.

THE STATE DID NOT FAIL TO DISCLOSE THE NAME OF THE WOMAN INVOLVED IN THE INCIDENT.

Petitioner claims that the State wrongfully withheld the fact that the woman[1] involved in the incident was named Darlene Jaworski and not Janice Carr. Although the record in this case is confusing and unclear, it is obvious that the State never informed Petitioner or his trial counsel that the woman was named Janice Carr. There was no attempt to obscure the issue or to mislead counsel. Rather, the defense originated the belief that Janice Carr was the woman involved. When TFC Mickey Norman testified, it was then discovered that apparently the woman involved was named Darlene Jaworski.

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[1] Petitioner characterizes the woman as an "informant". Note, however, that the undercover officer involved was unable to say whether she was an informant (T. 16).

Even if the Court were to believe that the State constructively erred by not somehow demonstrating that Darlene Jaworski was the woman involved, the error was harmless. Petitioner suggests that since this information was not received until the "final day of trial" (p. 4), it was too late to ha e any effect. Actually TFC Norman stated that the woman involved was Darlene Jaworski on the *first* day of trial, 28 November, 1977. Thereafter, the trial was continued for two weeks so as to give the defense an opportunity to locate Jaworski. Trial resumed on 13 December, 1977. Thus, Petitioner had full opportunity to make use of that knowledge and presumably could have had more opportunity if he had requested another continuance.

Petitioner suggests that Darlene Jaworski might have left the Baltimore area during the period between the filing of Petitioner's motion to produce (25 October, 1977) and TFC Norman's testimony (28 November, 1977). The sole basis for that suggestion is the testimony of Jaworski's ex-husband who stated that to the best of his knowledge his former wife had "just recently" gone to Hawaii (T. 113-114). The Maryland Court of Special Appeals wrote that the "trial court gave little credence to Mr. Jaworksi's testimony and . . . the crediblity of a witness is a matter for the trial court". Furthermore, TFC Norman testified that he had "information, if you can call it that, that's as old as two months ago that she may be either in Colorado or Hawaii" (T. 22).

Thus, the dictates of *Roviaro v. United States*, 353 U.S. 53 (1957) were satisfied. The name of the woman involved was made known to Petitioner and Petitioner was given ample time to act on that information.

III.

THE STATE DID NOT ERR BY FAILING TO PRODUCE THE WOMAN INVOLVED IN THE INCIDENT.

The record is clear that the State was unable to produce the woman involved, be it Janice Carr or Darlene Jaworski. TFC Norman testified that his only information, two months old, was that Carr and Jaworski were either in Colorado or Hawaii (T. 22). There was no indication that the State had any additional information or more current locations for Carr and Jaworski.

On the other hand, the defense had considerable "family contacts" with the missing sisters. During the first day of trial [28 November, 1977], the defense produced Edward Jaworski, former husband of Darlene and current client of the defense attorney's law firm. Jaworski testified that his ex-wife was in Hawaii (T. 107-116). When trial resumed on 13 December, 1977, the defense produced testimony from Bernadette Carr, Janice's sister-in-law, and Stephen Johnson, Bernadette's fiance (T. 129-151). They testified as to receiving mail and a telephone call from Janice in Hawaii.

Thus, it is apparent that while the State had no knowledge of or connection with Carr and Jaworski, the defense had a great deal. Clearly, Petitioner's trial counsel had considerable contact with Carr's and Jaworski's relatives and had the only current information produced in court as to the sisters' whereabouts. Certainly the State could not have produced witnesses whose location it did not know and, if anyone had the ability to locate Carr of Jaworski, it was the defense.

IV.

PETITIONER CANNOT NOW COMPLAIN ABOUT THE ALLEGED FAILURE OF THE STATE TO PRODUCE THE WITNESS AS PETITIONER CHOSE TO TAKE THE CASE TO VERDICT RATHER THAN TO ASK FOR A CONTINUANCE.

During the second day of the trial, the defense produced additional testimony concerning letters and a telephone call from Janice Carr in Hawaii. The letters came in envelopes containing return addresses. Thus, there was a chance that Carr or Jaworski could have been located, particularly given the family relationships between the sisters and the defense witnesses. Yet Petitioner did not seek another continuance but rather chose to conclude the case and ask for an acquittal.

Petitioner did not renew his motion to compel production of Janice Carr or ask for a ruling on his motion to produce Darlene Jaworski. Petitioner had apparently abandoned any interest in the motions to compel production and hence waived the issue by his actions and inactions.

Furthermore, Petitioner could have requested a further continuance.[2] The trial judge had earlier shown his willingness to grant a continuance and had given Petition a continuance twice as long as he had requested. Instead Petitioner chose to put on witnesses, rest his case, and proceed to verdict.

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[2] Petitioner notes the requirements of Maryland Rule 527(c)(2) concerning continuances. However, Rule 527(c)(2) applies only to civil cases, Maryland Rule 1.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court to deny the petition for writ of certiorari.

Respectfully submitted,

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